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IN THE
Supreme Court of the United States
OCTOBER TERM, 1995

SSC CORP.,
Petitioner,
v.
TOWN OF SMITHTOWN, TOWN BOARD OF THE TOWN OF SMITHTOWN, and PATRICK VECCHIO, Supervisor, TOWN OF SMITHTOWN,
Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Second Circuit

BRIEF FOR AMICUS CURIAE NATIONAL SOLID WASTES MANAGEMENT ASSOCIATION IN SUPPORT OF PETITIONER

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BRIEF FOR AMICUS CURIAE NATIONAL SOLID WASTES MANAGEMENT ASSOCIATION IN SUPPORT OF PETITIONER

INTEREST OF THE AMICUS CURIAE

This National Solid Wastes Management Association ("NSWMA") is a not-for-profit trade association whose 1300 member companies operate in virtually all 50 states and are engaged in the full spectrum of solid waste management services. NSWMA's members include collectors and transporters of solid waste, operators of solid waste treatment, storage, and disposal facilities, waste recyclers, manufacturers and distributors of waste management equipment, and firms providing legal, financial,

and consulting services to the solid waste management industry. Most of these entities participate in one way or another in the movement of waste in interstate commerce.[1]

NSWMA represents the interests of the waste management industry in judicial, legislative, and administrative forums. One threat to which the industry is perpetually subject is state and local efforts to prevent the interstate movement of waste for storage, treatment, disposal, or recycling. Accordingly, the NSWMA has a strong interest in presenting the views of its membership on the constitutionality of the flow control scheme at issue in this case.

SUMMARY OF ARGUMENT

This is one of a series of cases, arising in the aftermath of this Court's decision in *C & A Carbone, Inc. v. Town of Clarkstown*, 114 S. Ct. 1677 (1994) ("*Carbone*"), in which the Courts of Appeals have been required to address efforts by states or localities to evade *Carbone* by various methods designed to insure that waste continues to be funneled to local disposal facilities. A few courts have properly recognized that, whatever the means chosen, such efforts violate the Commerce Clause if their design and effort is to hoard the waste and the demand to get rid of it for the local facility.[2] Others, unfortunately, have upheld such evasions on various rationales, and in so doing have given strong encouragement—and

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[1] All of the parties in this case granted their consent to this amicus brief as reflected in letters filed with the Clerk of the Court.

[2] *See, e.g., Atlantic Coast Demolition & Recycling, Inc. v. Board of Chosen Freeholders*, 48 F.3d 701 (3d Cir. 1995); *Waste Recycling, Inc. v. Southeast Ala. Solid Waste Disposal Auth.*, 29 F.3d 641 (11th Cir. 1994), *aff'g* 814 F. Supp. 1566 (M.D. Ala. 1993).

indeed provided a road map—to localities seeking to retain their protectionist flow control practices.[3]

Review by this Court is urgently needed to insure that this course of conduct, with its pernicious effects on interstate commerce, does not continue. It seems certain that, absent intervention by this Court, localities—emboldened by decisions such as this—will continue efforts to block the flow of waste beyond their borders. Flow control is a nationwide phenomenon. At the time this Court handed down its opinion in *Carbone*, approximately 43 states had authorized local governments to institute flow control ordinances.[4] The waste handling and disposal facilities those ordinances were designed to protect cost millions to build and receive millions in revenues.[5] Because of the huge economic stakes involved, it is inevitable that numerous localities, such as Smithtown here, will continue to seek to devise waste management plans that modify the form of their waste flow regimes without altering their substance.

This case, and the companion decision issued by the Second Circuit the same day in *A.A. & M. Carting and USA Recycling, Inc. v. Town of Babylon*, 66 F.3d 1272—which will also be before this Court on petition for certiorari within the next few weeks[6]—are an ideal vehicle

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[3] In addition to the instant case, *see, e.g., USA Recycling, Inc. v. Town of Babylon*, 66 F.3d 1272, 1282-83, 1289 (2d Cir. 1995); *Harvey & Harvey, Inc. v. County of Chester*, 68 F.3d 788 (3d Cir. 1995).

[4] *House Comm. on Energy & Commerce, State Control of Management of Municipal Solid Waste*, H.R. Rep. No. 738, 103d Cong., 2d Sess. 7 (1994).

[5] *See* Sidney M. Wolf, *The Solid Waste Crisis: Flow Control and the Commerce Clause*, 39 S.D. L. Rev. 529, 567 (1994).

[6] The Plaintiffs in *A.A. & M. Carting* filed a petition for rehearing and suggestion for rehearing in banc with the Second Circuit, which was not acted upon until November 1, 1995. For that reason, the petition for certiorari in that case is not due until January 30,

for providing the Courts of Appeals with needed guidance. Together, these Second Circuit cases present two alternate techniques that can readily be used by other localities seeking to perpetuate their flow control regimes—a contractual restriction that requires haulers to take waste to a designated facility (in this case) and a more complex scheme that combines regulatory restrictions and financial manipulations to accomplish the same end (in *A.A. & M.*). In both instances, the Second Circuit relied on the so-called "market participant" doctrine to justify the town's discrimination against interstate commerce—a doctrine with which other Courts of Appeals have expressed marked confusion.

ARGUMENT

I. LOWER COURTS ARE VALIDATING THE EFFORTS OF LOCALITIES TO EVADE THIS COURT'S DECISION IN *CARBONE*

State and local laws restricting the free movement of trash in interstate commerce have proved to be a particularly nettlesome subject requiring repeated attention by this Court. Over seventeen years ago, the Court ruled that trash is entitled to the protection of the Commerce Clause and that state or local laws restricting the *import* of trash constitute a discrimination against interstate commerce that is virtually *per se* invalid. *See City of Philadelphia v. New Jersey*, 437 U.S. 617 (1978). The law laid down in *City of Philadelphia* seemed clear. Yet in its aftermath the Court on three separate occisions was forced to confront local schemes—upheld by the lower courts—designed to continue to discourage the import of out-of-state waste. In each instance, the Court found that the newly devised scheme likewise unconstitutionally discriminated against interstate commerce. *Oregon Waste*

1996. NSWMA has been advised by counsel for *A.A. & M.* that a petition for certiorari will be filed on or before that date.

Systems, Inc. v. Department of Envtl. Quality, 114 S. Ct. 1345 (1994); *Chemical Waste Management, Inc. v. Hunt*, 112 S. Ct. 2009 (1992); *Fort Gratiot Sanitary Landfill, Inc. v. Michigan Dep't of Natural Resources*, 504 U.S. 353 (1992).

Carbone was the first case to address the constitutionality of a local law designed to prohibit the *export* of trash to out-of-state points. This Court's ruling was again unequivocal—such a law is "just one more instance of local processing requirements that we long have held invalid." *Carbone*, 114 S. Ct. at 1682. Because the "design and effect" of the ordinance was to "hoard[] solid waste, and the demand to get rid of it, for the benefit of the preferred processing facility," *id.* at 1683, the export restraint was held to be a discrimination against interstate commerce.

Just as before, however, localities are devising means to avoid this Court's Commerce Clause teachings, this time embodied in *Carbone*. And, as the Second Circuit's decision demonstrates, these efforts, just as before, are striking a responsive, and indeed, far more dangerous chord in the lower courts. The decision below stands for a totally insupportable proposition in Commerce Clause jurisprudence—that a town can accomplish by contract what by ordinance is unconstitutional. The Second Circuit conceded that Smithtown's "flow control" ordinance, requiring all garbage to be taken to a favored facility, was flatly unconstitutional under *Carbone*. (Pet. App. at 6A.) Nonetheless, it upheld a contract which required all haulers to take garbage to that same facility. (*Id.*) If this sort of facile evasion is countenanced, this Court's *Carbone* decision will become a dead letter.

NSWMA submits that the lower court's conclusion is plainly wrong. This Court has repeatedly rejected the argument that under the Commerce Clause a local government may do indirectly what it cannot do directly. Indeed, the point was reemphasized only a few weeks after *Carbone* was decided:

> Commerce Clause jurisprudence is not so rigid as to be controlled by the form by which a State erects barriers to commerce. . . . *"The commerce clause forbids discrimination, whether forthright or ingenious.* In each case it is our duty to determine whether the statute under attack, whatever, its name may be, will in its *practical operation* work discrimination against interstate commerce."

West Lynn Creamery, Inc. v. Healy, 114 S. Ct. 2205, 2215-16 (1994) (quoting *Best & Co. v. Maxwell*, 311 U.S. 454, 455-56 (1940) (emphasis added)). *West Lynn Creamery* also dramatically illustrates another dictate that the Second Circuit declined to follow. The lower court examined Smithtown's scheme piece-by-piece rather than as a whole. "Smithtown is a 'major participant' in two 'discrete, identifiable class[es] of economic activity': waste collection and waste disposal." (Pet. App. at 27A.) The Second Circuit then concluded that Smithtown's actions in each of the two markets was lawful, on separate—and indeed inconsistent—rationales. (*Id.* at 29a-31a.) But this Court explicitly rejected this component-by-component approach in *West Lynn Creamery*, 114 S. Ct. at 2215, instead requiring that "the constitutionality of the program as a whole" be scrutinized.

Nor is the decision below merely an isolated "wrong" decision. Other cases likewise have upheld local schemes devised to perpetuate the very practice struck down in *Carbone*—the hoarding of trash and the demand for disposal services for a favored local facility. Thus the Second Circuit, in the companion *A.A.&M.* case, also carved up a complex flow control scheme into its "component" parts. After examining each "component" in isolation, the court upheld the scheme as a whole on the theory that the admittedly regulatory components did not discriminate against interstate commerce, and that those components that plainly funneled trash to a local facility

constituted "market participation" and thus were not subject to the Commerce Clause.

The Third Circuit also adopted a crabbed interpretation of *Carbone* in *Harvey & Harvey, Inc. v. County of Chester*, 68 F.3d 788 (3d Cir. 1995) when it addressed two separate Commerce Clause challenges to municipal "flow control" plans. In addressing the constitutionality of these schemes, the Third Circuit focused on "the process of selecting waste service providers rather than on the effect of the regulation once a provider or providers have been chosen." *Id.* at 802. The court concluded that as long as the selection process for the favored facility is open and competitive to in- and out-of-state businesses, there is no Commerce Clause violation. *Id.* The Third Circuit simply grafted this "process" focus onto Commerce Clause analysis in order to avoid *Carbone's* reach. Indeed, it conceded: "we cannot cite any authority for th[is] sort of inquiry." *Id. Carbone*, of course never mentions "process"; instead it stresses that the focus must be on the "design and *effect*" of the challenged scheme. *Carbone*, 114 S. Ct. at 1683 (emphasis added).

The road maps laid out by the decision below and the other decisions upholding various techniques for evading *Carbone* are certain to be followed by states and localities across the nation. The flow control ordinances that proliferated within the past decade were motivated by simple economic self-interest on the part of local governments: having undertaking various forms of financial commitments to local waste facilities, local governments have a strong interest in insuring that all trash in the town goes to their facility, *see Carbone*, 114 S. Ct. at 1684 ("flow control ordinance is a financing measure").[7]

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[7] *See also* U.S. Environmental Protection Agency, *The Solid Waste Dilemma: An Agenda for Action (Background Documents)* 8.B-2 (Sept. 1988); Eric S. Petersen & David N. Abramowitz, *Municipal Solid Waste Flow Control in the Post-Carbone World*,

Compliance with *Carbone* means that those localities will now have to compete for trash with out-of-town and out-of-state facilities. And to do so, these facilities may be forced to lower their prices—which may well require the town to make good on the financial guarantees to the facility. Meeting these commitments "through general taxes or municipal bonds," as this Court suggested in *Carbone, id.*, is likely to be politically unpopular. Thus there are strong economic and political incentives for local governments to seize upon any opening created by the Courts of Appeals to perpetuate their flow control regimes. This practical consequence underlines the importance of prompt consideration of this issue by this Court.

II. REVIEW BY THIS COURT IS NEEDED TO CLARIFY THE LIMITS OF THE "MARKET PARTICIPANT" DOCTRINE

In both this case and the companion *A.A.& M./USA Recycling* case, the Court below upheld the flow control scheme at issue by reliance on the so-called "market participant" doctrine. In so doing, it has stretched that doctrine far beyond any plausible limits, creating an exemption that threatens to swallow the rule prohibiting discrimination against interstate commerce.

This Court itself has recognized that the "precise contours of the market-participant doctrine"—which have been addressed by this Court in only five cases—"have yet to be established." *South-Central Timber Dev., Inc. v. Wunnicke,* 467 U.S. 82, 93 (1984). And a number of federal courts of appeals have expressed their uncertainty as to the application of that doctrine to a variety of factual circumstances. *See, e.g., GSW, Inc. v. Long County,* 999

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22 Fordham Urb. L. J. 361 (Winter, 1995); Kelly Outten, Note, *Waste to Energy: Environmental and Local Government Concerns,* 19 U. Rich. L. Rev. 373, 392 (1985).

F.2d 1508, 1511 (11th Cir. 1993) ("market participant doctrine . . . is a relatively new and difficult area of the Supreme Court's jurisprudence"); *Big Country Foods, Inc. v. Board of Educ.*, 952 F.2d 1173, 1178 (9th Cir. 1992) ("line between state market participation and state regulation is a fuzzy one that has perplexed courts and commentators alike"); *Swin Resource Sys., Inc. v. Lycoming County*, 883 F.2d 245, 249 (3d Cir. 1989) ("[a]pplication of the distinction between 'market participant' and 'market regulator' has . . . occasioned considerable dispute"), *cert. denied*, 493 U.S. 1077 (1990). Given the nationwide importance of solid waste flow control, and the pivotal importance of the market participant doctrine in the Second Circuit's analysis, this Court should grant certiorari in order to clarify the relationship of that doctrine to general Commerce Clause jurisprudence.

The basic thrust of the market participant doctrine seems straightforward: it permits a locality to discriminate, under certain circumstances, in favor of its own residents when it purchases goods,[8] sells goods[9] or hires workers.[10] The rationale is that when the government participates in the marketplace like any private business, it has the prerogative to choose with whom it will deal, just as a private business might do.

The Second Circuit, however, has improperly expanded the "market participant" doctrine to condone a town doing what no private company could do—use its regulatory power to effectively compel the use of a designated local disposal facility by all generators of waste. Smithtown, of course, does not just impose conditions on the collection and disposal of waste generated by the town

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[8] *Hughes v. Alexandria Scrap Corp.*, 426 U.S. 794 (1976); *Wyoming v. Oklahoma*, 502 U.S. 437 (1992).

[9] *Reeves, Inc. v. Stake*, 447 U.S. 429 (1980).

[10] *White v. Massachusetts Council of Constr. Employers*, 460 U.S. 204 (1983).

itself—*i.e.*, by the City Hall, the town jail and other town buildings—which, as a purchaser of waste collection and disposal services, it could properly do. Rather, through the use of its regulatory powers, Smithtown has compelled its citizens, through SSC, to utilize the local disposal facility. This makes Smithtown a "market regulator," not a "market participant."

The four cases in which the Supreme Court has recognized the market participant doctrine—*Reeves, Alexandria Scrap, White,* and *Wyoming*—all involved a local government's right to deal voluntarily with whom it wanted, *not* to *compel* third parties to deal only with the local governments. Thus, *Reeves* concluded that South Dakota could sell cement it manufactured only to South Dakota residents. The decision nowhere suggests that South Dakota could require its residents to buy *only* from it. Similarly, *Alexandria Scrap* merely held that, in buying scrap, Maryland could apply more lenient paperwork standards to local residents. It did not hold that Maryland could compel local dealers to sell only to the State. *White* allowed the City of Boston to contract only with contractors that met standards the City thought important; it did not allow Boston to compel the contractors to work for the City. And finally, *Wyoming* allowed an Oklahoma agency purchasing coal to give a preference to local producers; it did not allow Oklahoma to compel those producers to sell only to the State. The Second Circuit has thus extended the market participant doctrine far beyond any point ever recognized by this Court.

Indeed, rather than a "market participant," Smithtown is more properly characterized as a market monopolist. Unlike the other "market participant" cases cited above, the Town has not entered into a commercial transaction in the marketplace alongside private businesses. See *Western Oil & Gas Ass'n v. Cory*, 726 F.2d 1340, 1342-43 (9th Cir. 1984) (declines to apply "market participant" exception since California's Lands Commission had "a

complete monopoly over the sites" being leased; only "state's participation in the marketplace *as a competitor* to be shielded from the Commerce Clause") (emphasis added), *aff'd mem.*, 471 U.S. 81 (1985). Far from subjecting itself to the same restrictions imposed on private businesses in the marketplace—the prime justification for relieving a town of Commerce Clause restraints when it acts as a market participant [11]—Smithtown here has used its regulatory power to create for itself a monopoly in the market it has chosen to enter. The fact that Smithtown's monopoly power was authorized by the state [12] simply confirms the fundamental point—Smithtown is acting in its governmental capacity as a market regulator, not as a

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[11] *Reeves*, 447 U.S. at 439. For example, a private business in the marketplace cannot violate the anti-trust laws. This Court has justified the Commerce Clause immunity of the "market participant" exception by noting that the anti-trust laws apply to states acting as "market participants." *South-Central Timber Dev., Inc. v. Wunnicke*, 467 U.S. at 98-99 (plurality opinion). *See generally* Barton B. Clark, Comment, *Give 'Em Enough Rope: States, Subdivisions and the Market Participant Exception to the Dormant Commerce Clause*, 60 U. Chi. L. Rev. 615, 629 (1993) (recommends that courts look to the anti-trust laws to ensure that states do not abuse their powers in the guise of "market participants"). Yet the court below brushed aside this point, focusing instead on the antitrust immunity granted to Smithtown by the State of New York. (Pet. App. at 32a.)

Although petitioner has not framed this issue in his petition for certiorari, the lower court, in its opinion, also announced that it was "far from clear" that Smithtown's status as a market participant would subject the town to the antitrust laws. To reach this conclusion, the Second Circuit cited to two decisions of this Court, *City of Lafayette v. Louisiana Power & Light Co.*, 435 U.S. 389 (1978) (plurality opinion) and *Community Communications Co. v. City of Boulder*, 455 U.S. 40 (1982), that did not involve the "market participant" doctrine at all, while ignoring *South-Central Timber* entirely and according only a "but see" reference to the recent decision in *City of Columbia v. Omni Outdoor Advertising*, 499 U.S. 365, 378 (1991), which explicitly refers to "the possible market participant exception" to state-authorized antitrust immunity.

[12] *See* Pet. App. at 31a.

market participant. This action alone should negate any claim of market participant status.

Finally, the decision below conflicts in principle with an Eleventh Circuit opinion, *Waste Recycling, Inc. v. Southeast Ala. Solid Waste Disposal Auth.*, 29 F.3d 641 (11th Cir. 1994), *aff'g* 814 F. Supp. 1566 (M.D. Ala. 1993), whose reasoning the Second Circuit explicitly "decline[d] to adopt." (Pet. App. at 29a.) In *Waste Recycling*, the Eleventh Circuit invalidated a series of municipal contracts and flow control ordinances which mandated that solid waste collected within the municipalities be delivered to a favored facility. The Eleventh Circuit flatly rejected the municipalities' claims that they were "market participants": "[t]he expressed intent behind these contracts and the three representative ordinances based on them is not individual market participation but broad market regulation." 814 F. Supp. at 1572-73. Thus, the Eleventh Circuit but not the Second, has properly understood the limits of the market participant doctrine.

This case (and the companion *A.A. & M./USA Recycling* case) provide a perfect opportunity for this Court to delineate the contours of the "market participant" doctrine. Left on their own, lower courts are abusing that doctrine and, in so doing, are encouraging states and localities to make counterfeit claims of being "market participants" so that they can discriminate against interstate commerce. This Court must step in to keep the "market participant" exception from swallowing the dormant Commerce Clause rule.

CONCLUSION

For the foregoing reasons, the petition for certiorari should be granted, or at a minimum, held for consideration with *A.A. & M./USA Recycling*.

Respectfully submitted,

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